

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE TRIAL CHAMBER****SPECIAL TRIBUNAL FOR LEBANON**

**Case No:** STL-11-01/T/TC

**Before:** Judge David Re, Presiding  
Judge Janet Nosworthy  
Judge Micheline Braidy  
Judge Walid Akoum, Alternate Judge  
Judge Nicola Lettieri, Alternate Judge

**Registrar:** Mr Daryl Mundis

**Date:** 7 September 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

**SALIM JAMIL AYYASH  
HASSAN HABIB MERHI  
HUSSEIN HASSAN ONEISSI  
ASSAD HASSAN SABRA**

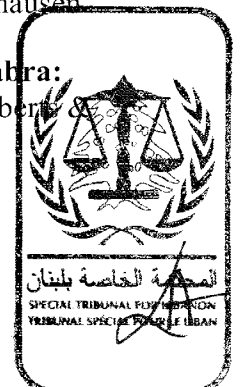
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**DECISION ON OBSERVATIONS FROM HEAD OF DEFENCE OFFICE ON  
LEBANESE CRIMINAL LAW**

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**Office of the Prosecutor:**Mr Norman Farrell & Mr Alexander Hugh  
Milne**Head of Defence Office**

Mr François Roux

**Legal Representatives of****Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper  
du Hellen & Mr Jad Youssef Khalil**Counsel for Mr Hussein Hassan Oneissi:**Mr Vincent Courcelle-Labrousse, Mr Yasser  
Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Robert &  
Ms Sarah Bafadhel

## **PROCEDURAL BACKGROUND**

1. Article 2 of the Statute of the Special Tribunal for Lebanon, ‘Applicable criminal law’, annexed to Security Council Resolution 1757 (2007), specifies that the Special Tribunal must apply, relevantly, the Lebanese Criminal Code relating to ‘the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity ... including the rules regarding the material elements of a crime, criminal participation and conspiracy’. Article 3 ‘Individual criminal responsibility’ sets out the applicable modes of liability.
2. The four Accused are charged—pursuant to Articles 1 and 11 of the Statute—with committing crimes contrary to the Lebanese Criminal Code and the Lebanese Law of 11 January 1958 on ‘Increasing the penalties for sedition, civil war and interfaith struggle’.
3. As the Prosecution case is nearing completion, the Trial Chamber, on 27 July 2017, ordered the Parties to file submissions, and the Legal Representatives of Victims to file observations, by Friday 8 September 2017 in relation to Lebanese law.<sup>1</sup> Specifically, legal submissions were ordered ‘on the elements of the offences charged in the amended consolidated indictment, on the modes of liability applicable under the relevant Lebanese laws, and on any other relevant legal matter’.
4. The Trial Chamber made this order after discussing its possible timetable with the Parties and the Legal Representatives at a case management meeting held on Thursday 27 July 2017. A representative of the Head of Defence Office was present at the meeting.
5. On 30 August 2017, on the application of the Legal Representatives, the Trial Chamber varied the time for the filing of their observations to Wednesday 13 September 2017.<sup>2</sup> Any responses to submissions and observations must be filed by Monday 18 September 2017.
6. On Friday 25 August 2017, four weeks after the Trial Chamber’s order, the Head of the Defence Office sent an *ex-parte* email to the five judges working in the Trial Chamber informing them that he intended, *proprio motu*, to make submissions about this matter under Rule 57 (F) of the Special Tribunal’s Rules of Procedure and Evidence.

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3254 Order to Parties and Legal Representatives of Victims to File Submissions and Observations on Lebanese Law, 27 July 2017.

<sup>2</sup> Transcript of hearing, 30 August 2017, pp 83-84.

7. The *ex-parte* email made substantive legal arguments concerning the interpretation of Rule 57 (F). It should not have done so. This is of concern to the Trial Chamber because the Head of Defence Office also did this in a similar *ex-parte* email sent to the same five judges on 28 February 2017, to which was annexed a memorandum labelled ‘strictly confidential’, that in effect asked the Trial Chamber to reconsider a decision.<sup>3</sup> Communications of this nature should go through the Trial Chamber’s senior legal officer, must be copied to the Parties and Legal Representatives of Victims, and preferably, should be filed. Substantive legal submissions should not be made in *ex-parte* emails.

8. After receiving the *ex-parte* email, the Trial Chamber immediately had its senior legal officer forward it to the Parties and the Legal Representatives of Victims—and copied to the Head of Defence Office—asking the Prosecution if it wished to make any submissions. The Prosecution, on 29 August 2017, filed brief submissions.<sup>4</sup>

9. Consequently, by email on 29 August 2017, the Trial Chamber sought ‘a written filing from [the Head of the Defence Office] outlining the reasons of [his] anticipated intervention under Rule 57 (F)’, by 31 August 2017. The email also asked the Prosecution, Defence and Legal Representatives of the Victims to respond, if they wished, by 4 September 2017. The Head of Defence Office filed written submissions on Thursday 31 August 2017<sup>5</sup>—received by the Trial Chamber and the Parties only after midday on Monday 4 September 2017.<sup>6</sup> He failed to state the reasons, as requested by the Trial Chamber, for his anticipated intervention. The Prosecution filed a brief response the same day.<sup>7</sup>

## DISCUSSION

10. Rule 57 is headed ‘Functions of the Head of Defence Office’. Rule 57 (E) (i) provides (relevantly) that the Head of Defence Office shall provide *proprio motu* or upon the request of Defence counsel, ‘adequate assistance and support to Defence counsel and their staff, including where appropriate, legal research and memoranda and other advice as deemed

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<sup>3</sup> See, F3093, Prosecution Request to Clarify the Status of the Internal Memorandum of 28 February 2017 sent by the Head of Defence Office to the Judges of the Trial Chamber, 20 April 2017.

<sup>4</sup> F3299, Prosecution Response to Head of Defence Office Indication of Submissions under Rule 57 (F), 29 August 2017.

<sup>5</sup> F3306, Observations du Chef du Bureau de la Défense sur son droit d’audience *proprio motu* et demande de clarification, 31 August 2017.

<sup>6</sup> It was filed at 16.05 on Thursday 31 August 2017, the day before a public holiday, but the Head of Defence Office did not send courtesy copies to the Trial Chamber and Parties, meaning that it was not circulated by the Special Tribunal’s Court Management Services Section until 12.19 on Monday 4 September 2017.

<sup>7</sup> F3308, Prosecution Response to ‘Observations du Chef du Bureau de la Défense sur son droit d’audience *proprio motu* et demande de clarification’, 4 September 2017.

necessary'. This is how the Head of Defence Office normally exercises the functions of his office.

11. Rule 57 (F) provides,

At the request of a Judge or Chamber, the Registrar, the Defence or where the interests of justice so require, *proprio motu*, the Head of Defence Office or a person designated by him shall have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.

12. A Practice Direction issued in 2011 governs how the Head of Defence Office may exercise this right.<sup>8</sup> Section 2, 'Submissions during proceedings' states,

At the request of the Pre-Trial Judge, a Chamber, the Registrar or the Defence, the Head of Defence Office may make oral or written submissions in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.

If the Head of Defence Office considers that the interests of justice require his intervention orally or in writing *proprio motu*, pursuant to Rule 57 (F), he shall inform the Pre-Trial Judge or Chamber in advance whenever possible. The Pre-Trial Judge or Chamber shall hear the other parties to the proceedings on the issue of whether the intervention is in the interests of justice only if the exceptional circumstances of the case so require.

13. The Head of Defence Office's statutory right to intervene *proprio motu* in the proceedings in 'general interest to defence teams, the fairness of the proceedings, or the rights of a suspect or accused' is not an unlimited right and, for the reasons below at paragraph 20, the Trial Chamber may regulate his intervention.

14. Some obvious issues, such as State co-operation with Defence counsel in their investigations or preparations for trial,<sup>9</sup> or the resources available to Defence counsel,<sup>10</sup> naturally fall within Rule 57 (F). The public policy reason for this restriction, reflected in the Practice Direction, is the recognition that in 'proceedings' the Accused—who are parties to the proceedings—will be legally represented by counsel who should file relevant legal submissions. Indeed, twelve qualified and competent counsel have been assigned by the Head

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<sup>8</sup> Practice Direction on the Role of the Head of Defence Office in proceedings before the Tribunal, 30 March 2011, STL/PD/2011/04.

<sup>9</sup> See, e.g. F1889, Decision on Updated Request for a Finding of Non-compliance, 27 March 2015.

<sup>10</sup> See, e.g. F2286, Decision on Defence Request to Modify the Conditions of Assignment of Omar Nashabe in President's Decisions of 21 December 2012 and 27 March 2013, 23 October 2015.

of Defence Office to represent the four Accused in the proceedings—three to each, supported by employed non-assigned lawyers.

15. Further, regulating the right of interveners—such as Rule 131 does in requiring a potential *amicus curiae* to obtain leave before filing a brief or appearing in court—also assists effective trial management by limiting interventions from those with no direct interest in the proceedings, namely, those who are not parties or participants to the proceedings, or, for example, a witness who is seeking some form of order.<sup>11</sup> Thus, as the Practice Direction specifies, any intervention by the Head of Defence Office is limited to specified circumstances.

16. The Registrar, by virtue of his office, has a broader right of intervention, and under Rule 48 (C), ‘in the exercise of his functions, may make oral and written representations to the President or Chambers on any issue that affect the discharge of his functions, with notice to the Prosecutor, the Defence and Head of Defence Office where appropriate’. Under Rule 57 (C) the Head of Defence Office shall ‘for all purposes connected with pre-trial, trial and appellate proceedings, enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*’.

17. On the role of the Head of Defence Office in intervening in proceedings, the Appeals Chamber has held,<sup>12</sup>

Moreover, we consider that the HDO, who protects the rights of the Defence and is primarily responsible for providing support and assistance to Defence counsel, cannot enjoy rights which go beyond those of the Parties. Accordingly, his submissions must comply with the same time limits and leave requirements as those that are applicable to Defence counsel and the Prosecutor. Otherwise, unfairness could arise, because the HDO would be able to augment the filings of the Parties even when they themselves could not do so. This also carries the potential of delaying the proceedings.

18. The routine legal submissions that are made in the day to day conduct of a trial are not exceptional. The issue here, of the elements of the offences charged in the amended consolidated indictment and the modes of liability—and more specifically the state of

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<sup>11</sup> See, e.g. F2040, Decision on Prosecution Application for a Summons to Appear for Witness 012 and Order Issuing a Summons for a Witness, 1 July 2015; F2069, Decision Denying Certification to Appeal the Trial Chamber’s Decision on Issuing a Summons to Witness 012, 10 July 2015.

<sup>12</sup> F0013-AR126.10, Decision on Interlocutory Appeal against the Trial Chamber’s Decision Regarding the Conditions of Assignment of Defence Expert Consultant, 3 May 2016, (‘Appeals Chamber decision’) para. 22.

substantive Lebanese criminal law—is arguably not one of ‘*general interest to defence teams*’, (emphasis added) but rather would appear to be highly specific to the charges against each individual Accused. Similarly, it may not, of itself, relate to the fairness of the proceedings or the rights of an Accused.

19. As is common in any other case involving multiple accused persons, there may be a plurality of views or submissions as to the state of the law in a given situation. To illustrate, count one of the amended consolidated indictment alleges a conspiracy between the four Accused to commit a terrorist act by means of an explosive device. A conspiracy, by its nature, involves a multiplicity of actors. Counsel for the individual Accused may therefore differ as to what is legally required to prove a conspiracy. The issue, on its face, thus appears to be a classic *inter-partes* matter between the Prosecution, counsel for each Accused, and one in which the participating victims may have an interest.

20. It is trite to state that the Trial Chamber, like any other court, has the inherent power to control its proceedings and that it may make any necessary orders to the Registrar, Parties, Legal Representatives of Victims and Head of Defence Office in exercising these powers. This may include orders on the content, size and timetable for submissions, observations or other filings, or any matters occurring in the courtroom. Here, the Trial Chamber did not seek observations from the Head of Defence Office on Lebanese law, and no-one has sought to file an *amicus curiae* brief under Rule 131.

21. The Head of Defence Office has not informed the Trial Chamber, as it requested, of the topic of his proposed intervention under Rule 57 (F). That is, whether it relates to the ‘*general interest to defence teams*’—which would be difficult to justify—the fairness of the proceedings, or the rights of the Accused. The Trial Chamber is thus left in the dark as to why the Head of Defence Office wishes to intervene in what may appear on its face to be the filing of routine legal submissions.

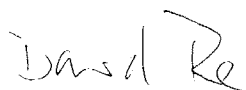
22. However, in regulating its own proceedings and in the exercise of its discretion—and in the absence of any information from the Head of Defence Office as to why he wishes to intervene—the Trial Chamber will authorise the Head of Defence Office to file observations related strictly to the order of 27 July 2017. Any observations must follow the letter of this order, namely, ‘the elements of the offences charged in the amended consolidated indictment, on the modes of liability applicable under the relevant Lebanese laws, and on any other

relevant legal matter'. Observations that merely endorse other submissions, generally, do not assist.<sup>13</sup>

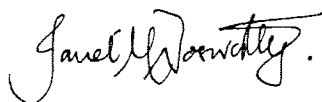
23. The Head of Defence Office may therefore file observations of up to 3,000 words, by Friday 8 September 2017, confined to the terms of the order. The observations must be sourced to the relevant Lebanese statutory or case law and any case or statutory provision cited must be filed—with English translations for the three judges who are not Arabic speakers—as an annex.

Done in Arabic, English, and French, the English version being authoritative.

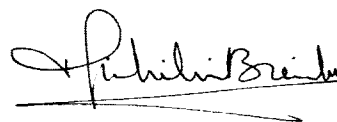
Leidschendam,  
The Netherlands  
7 September 2017



\_\_\_\_\_  
Judge David Re, Presiding



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Judge Janet Nosworthy



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Judge Micheline Braidy

<sup>13</sup> See, e.g. Appeals Chamber decision, para. 24. In dismissing observations on a response filed by the Head of Defence Office but filed out of time and without seeking leave, the Appeals Chamber added that 'given that HDO does not make any substantive submissions in his observations and they would have thus been of no assistance to the Appeals Chamber in reaching its decision'.

